United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1611

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1611

REA EXPRESS, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITION FOR REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

REPLY BRIEF FOR PETITIONER REA EXPRESS, INC.

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REPLY BRIEF FOR PETITIONER REA EXPRESS, INC.

PRELIMINARY STATEMENT

Faced with the express statutory command of Section 102 of the Federal Aviation Act, 49 U.S.C. §1302, that "the Board shall consider" certain specified factors "as being in the public interest" and REA's opening demonstration that the Board totally ignored the relevant economic, effect on commerce, and system development aspects of Air Express, the CAB has elected to stand mute before this Court. The CAB's 65 page brief never even mentions, no less explains, Section 102 of the Act and makes no effort to justify the elimination of the unique Air Express service concept and the termination of its benefits to the thousands of shippers who depend on it and support it.

Stripped of rhetoric, the positions of the Board and its supporting intervenors,*/ are clear and deeply disturbing. The Board lays claim to unfettered discretion in defining the "public interest" regardless of Section 102, argues that it may do away with Air Express service because inferior, higher cost alternatives do exist for shippers, and continues to speculate that a hypothetical superior replacement will arise from REA's ashes. The forwarder intervenors, urging the destruction of an entire competing service as well as REA, don the sheeps' clothing of competition by urging that what the Board claims is neither "unique" nor "essential" is, in fact, a dangerous monopoly.

As we shall demonstrate in detail, however, the CAB cannot write the Congressional mandate of Section 102 out of the Act or annihilate Air Express service simply because REA's reform proposals are not appealing to it. And the forwarder intervenors cannot sustain the effective elimination of any competition in air cargo transportation by their Alice-in-Wonderland approach to the competitive issues.

Given the CAB's unyielding refusal to recognize, no less grapple with, the statutory issues relevant to Air Express, this Court would be justified in summarily reversing

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*/ Brief for Emery Air Freight Corporation ("Emery"); Brief of Intervenor Air Freight Forwarders Association ("AFFA"); and Brief for Airline Intervenors ("Airlines"). Other abbreviations contained herein conform to those appearing in our opening brief (see REA Brief, p. 8 n. */).

the Board's orders as woefully short of the standards required by the Administrative Procedure Act. ABC Air Freight Co., Inc. v. CAB, 391 F.2d 295 (2d Cir. 1968). REA urges, however, that the Court also instruct the Board that the statutory "public interest" factors in Section 102 must be considered in light of Air Express' unique economic characteristics before any further decision in this complex matter.

ARGUMENT

I. The CAB Has Not Explained, And In Many Cases Has Not Even Addressed, Its Failure To Consider The Relevant "Public Interest" Factors Expressly Specified By Congress In The Federal Aviation Act.

There is no dispute among the parties that the "public interest" is the ultimate standard which the CAB must apply in determining whether to continue the Air Express Service.*/ The important question raised in this appeal, however, is what factors and considerations must be evaluated by the CAB in reaching its public interest determination.

In the CAB's view, the "public interest" consists solely of those factors which it chooses to investigate. Thus, it characterizes the present case as "a rather simple one involving no real issues other than the ones of whether the Board's determinations were reasonable and supported by the evidence of record" (CAB Brief, p. 38).

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*/ See REA Brief, p. 24; CAB Brief, p. 38; Emery Brief, pp. 7-8.

As we have previously shown (REA Brief, pp. 23-33), however, the CAB has no such roving mandate. Rather, Congress has expressly prescribed those factors which the CAB must take into consideration in assessing the "public interest" and it is the function of this Court "to assure that the agency has given reasoned consideration to all material facts and issues."**/ ALPA v. CAB, 475 F.2d 900, 906 (D.C. Cir. 1973); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 406 U.S. 950 (1971).

In our opening brief, we have set forth in considerable detail those statutory "public interest" considerations which the CAB has disregarded. As we show below, the Board' brief to this Court wholly fails to justify, or adequately address, these issues.

A. Consideration of economic effects

Congress was quite explicit in Section 102 of the Federal Aviation Act that the CAB "shall consider . . . as being in the public interest . . . [t]he promotion of adequate, economical and efficient service by air carriers at reasonable charges" 49 U.S.C. §1302. In light of this clear statutory

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*/ As the Supreme Court declared in Schaffer Transportation Co. v. United States, 355 U.S. 83, 88 (1957), "[j]ust as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."

language, the courts of appeals have expressly held that "a realistic view of the public interest in an air carrier operation must include economic effects." Alaska Airlines v. CAB, 285 F.2d 672, 674 (D.C. Cir. 1960); see Nebraska Department of Aeronautics v. CAB, 298 F.2d 286, 291 (8th Cir. 1962)(the public interest "is defined by §102 . . . to include economic considerations"). As shown in our opening brief (REA Brief, pp. 24-27, 33-37), the CAB's failure to adequately address the crucial economic and rate issues involved in the present controversy renders its decision to terminate Air Express fatally defective.*/ Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957).

The CAB's lame effort (CAB Brief, p. 36) to distinguish the Schaffer case on the ground that that case involved "intermodal competition" while the present case does not, is wholly unavailing. Major portions of the CAB's orders in the

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*/ Contrary to the CAB's present argument (CAB Brief, p. 48), the statutory obligation of the CAB to consider economic and rate issues arises not only from the express language of Section 102, but also from the ratemaking factors specified in Section 1002(e), 49 U.S.C. §1482(e). As discussed in our opening brief (REA Brief, p. 26), the CAB's action in the present case terminating Air Express in practical effect abolished the entire Air Express rate structure. Thus here, as in Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), "[a]s a practical matter, the Board's order amounted to the prescription of rates" (id. at 897, emphasis added), and accordingly the ratemaking factors specified by Congress in Section 1002(e) must be considered. The CAB may not simply disregard such crucial considerations as "the effect" of its orders "upon the movement of traffic" or "the need in the public interest of adequate and efficient transportation of . . . property by air carriers at the lowest cost consistent with the furnishing of such service" 49 U.S.C. §1482(e)(1) & (2)(emphasis added).

Service case, and a major section of its brief to this Court (CAB Brief, pp. 40-47), are devoted to a detailed comparison of a few limited transportation characteristics of Air Express vis-a-vis the competing air cargo services of airline airfreight and air freight forwarding. On the basis of such comparisons, the CAB argues that the continuation of Air Express is no longer required in the public interest because shippers are adequately served by the other two modes of air cargo transportation. Ironically, however, the CAB at the same time argues that when it comes to the comparative economic analysis mandated by Schaffer, intermodal comparative issues cease to be involved. Clearly, the principles established by the Supreme Court in the Schaffer case are directly applicable to the present controversy and are controlling, the CAB's specious contentions notwithstanding. */

The Administrative Law Judge in the Service case, consistent with Schaffer and on the basis of the available record evidence, undertook the appropriate detailed economic inquiry necessary to correctly evaluate the "public interest" in the continuation of Air Express. He recognized that "a component of air express particularly vital to many shippers is the reasonable rate structure with respect to small shipments" (J.A. 621(a)), emphasis added). He found that this "vital"

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*/ Similarly, the CAB's attempt (CAB Brief, p. 36 n. 24) to distinguish Trailways of New England v. CAB, 412 F.2d 926 (1st Cir. 1969) on analogous grounds must be rejected.

characteristic was the result of substantial economies inherent in the Air Express transportation concept which could not be matched by the other air cargo services (see REA Brief, pp. 34-35).

What the CAB did with respect to these clear and explicit economic findings of the Administrative Law Judge remains a mystery to all concerned. On the one hand, Emery argues that "the Board was correct in not considering rate levels for Air Express in the Express Service Investigation" (Emery Brief, p. 34). At the other extreme, AFFA claims that the CAB did in fact decide the ultimate economic issues, utilizing "its general knowledge of, and expertise in, air cargo economics" (AFFA Brief, p. 14). The Airlines merely contend that there was adequate evidence in the record, giving "the Board a full opportunity to explore rate advantages and disadvantages of express, as compared to other service," but stop short of arguing that the CAB ever attempted to make the requisite economic findings (Airlines' Brief, p. 47 n. 19).

On its own part, the CAB expressly acknowledges "the value of REA's low rates for small-package shippers," but then states, without supporting citation to the orders under review, that "[i]t was the Board's judgment, however, that this single factor did not override the other factors which collectively led to its conclusion that continuation of the service was no longer merited" (CAB Brief, p. 47). Neither

the CAB's orders, nor its brief to this Court, ever mentions the Administrative Law Judge's explicit findings on these "particularly vital" economic issues or offers any evidence tending to rebut his determinations.*/

As noted above, it is the function of this Court, "to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision . . . ." ALPA v. CAB, supra; Greater Boston Television Corp. v. FCC, supra. Clearly here, where each of the intervenors on the side of the CAB has its own separate interpretation of what the CAB did or did not consider, something more is required that the CAB's one sentence

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*/ The ALJ's findings were based upon the economic evidence presented by the parties in the Service investigation. The CAB had an opportunity to more fully consider these issues in the Rates proceeding where the questions of future Air Express rate levels and structure were in issue. The CAB, however, opted to moot rather than decide the Rates case and consequently eliminated all further comparative economic evidence from consideration.

The various arguments (see, e.g., Airlines' Brief, pp. 48-53) to the effect that the CAB did not err in failing to consolidate the Service and Rates proceedings miss the point entirely. The question is one of substance, not form. Thus, it makes little difference how the CAB structures its proceedings as long as all the material statutory factors necessary for a particular determination have been considered. The fact that the CAB attempted to shunt the crucial economic considerations of future Air Express rate levels and structure into a separate proceeding which was never decided, evidences the CAB's disregard of the statutory requirement that economic issues be fully and adequately explored. It is this substantive failure of the CAB to conform its deliberations to the requirements of the Federal Aviation Act which constitutes clear legal error.

boilerplate declaration that it has weighed the comparative economic considerations. As in the Schaffer case, the CAB's orders here under review must be set aside and the proceedings remanded with instructions that the CAB clarify its reasoning and make adequate findings with respect to a comparative economic analysis of Air Express and the alternative air cargo services.

B. Effects on shippers and local service carriers

As we pointed out in our main brief (REA Brief, pp. 38-43), Congress has explicitly defined the "public interest" standard of the Federal Aviation Act to require consideration of "the present and future needs of the foreign and domestic commerce" 49 U.S.C. §1302(a). The most direct and significant evidence of the present and future needs of the shipping public comes, of course, from the actions and testimony of shippers themselves.

The shipping community clearly demonstrated its strong interest in the continuation of the Air Express Service in the summer of 1970. At that time, shippers sought and obtained an injunction against the air carriers' proposed embargo of air express shipments which threaten to end Air Express service. Similarly, the record in the Service case is replete with shipper testimony unanimously in support of the continuation of Air Express, which the Administrative Law Judge correctly

and comprehensively reviewed (J.A. 613(a) - 618(a)). Almost 140 affidavits from various shippers were also submitted to this Court in support of REA's motion to stay.*/ Indeed, shipper interests have intervened in the present proceedings and filed compelling briefs with this Court urging that the CAB's orders, which will destroy or significantly injure their business operations, be set aside.**/

In its brief, as it did in the orders now under review, the CAB does not even acknowledge, let alone attempt to refute, these clear expressions of the "needs of domestic commerce." Rather than heeding the protests of the shipping public, the CAB, in its administrative omniscience, instructs the shippers that, although they don't realize it, they will actually be better off once Air Express is gone (see J.A. 671 (a)). Again the CAB has ignored, without any explanation, an explicit public interest factor which it is required by statute to consider.

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*/ See Stay Exhibits, Vol. I, A-1 through A-139.

**/ These shipper intervenors include the National Small Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, Pet Industry Joint Advisory Council, Association of Animal and Fish Distributors, Inc., National Pet Dealers and Breeders Association, Inc., Pet Producers of America, Inc., Florida Tropical Fish and Farm Association, Inc., Safari Animal Imports, Inc., Gators of Miami, Inc., and A-1 Animal Ranch, Inc.

Similarly, Congress has defined the CAB's public interest standard to include consideration of "[t]he promotion, encouragement and development of civil aeronautics", as well as the "sound development of an air-transportation system." 49 U.S.C. §1302(f) & (d). As we have shown (REA Brief, pp. 43-45), however, the CAB has wholly failed to evaluate the Administrative Law Judge's undisputed findings that, as a result of terminating Air Express, the smaller, regional air carriers would suffer significant diversion of air cargo traffic and that the trunkline carriers' problems of unused cargo space on daytime, combination flights would be aggravated.

Neither the CAB's brief, nor the briefs of any of the intervenors, even has attempted to address this issue. Yet, the CAB's brief expressly concedes that the Administrative Law Judge's ultimate finding that continuation of the Air Express Service was in the public interest was based in part upon his subsidiary finding that "local service air carriers and the trunk air carriers would be adversely affected by the abolition of the present air express system" (CAB Brief, p. 19). The CAB's failure even to mention these findings in its orders reversing the Administrative Law Judge constitutes error. In Re United Corp., 249 F.2d 168, 181 (3d Cir. 1957); see Greater Boston Television Corp. v. FCC, supra, 444 F.2d at 853.

The CAB's failure to meet in its brief the issues raised by the Administrative Law Judge's findings on the needs of shippers and the effects upon the air transportation system confirms what is clear from the underlying orders themselves -- the CAB has wholly failed to consider important statutory public interest factors. The CAB's implicit admission that these material facts and issues were ignored requires that its orders be set aside. ALPA v. CAB, supra.

C. Effects on competition

The CAB's brief, and more especially the briefs of Emery and AFFA, */ present the argument that the Air Express Service is a "monopoly" and must be eliminated in the interest of competition. To be sure, "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system" is one element of the public interest which the CAB must consider. 49 U.S.C. §1302(d). As we show below, however, it is the termination of Air Express which, in reality, will result in serious anticompetitive consequences.

To begin with, Air Express holds no "protected monopoly" over any portion of air cargo transportation. While the economies inherent in the partnership arrangement for providing Air Express give this service competitive advantages for the

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*/ See CAB Brief, pp. 59-61; Emery Brief, pp. 31-34; AFFA Brief, pp. 4-6, 17, 34-36.

carriage of small shipments, which are passed on to the shipping public in the form of lower rates, there is no legal bar to either the airlines or the freight forwarders competing for such traffic.*/

When it first considered the relationships among air express, airline airfreight and air freight forwarding in 1948, the CAB expressly recognized that there will always be "an element of competition" between these air cargo services which, in turn, "will inure to the highest development of each." Air Freight Forwarder Case, 9 C.A.B. 473, 488 (1948). These three services have been competing now for over a quarter of a century and each carries a substantial volume of shipments.**/

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*/ The CAB's argument that "the present air express arrangement serves to some degree to inhibit the participating airlines from extending their full efforts to develop and provide dependable small package services" (CAB Brief, p. 60) is economic nonsense. Indeed, virtually all of the carriers have in fact instituted their own small package, expedited services in competition with Air Express (see Service Exhibit REA-310).

Similarly, the CAB's argument that the air express agreements have the effect of "excluding airfreight forwarders from various types of markets" and therefore are "anticompetitive" (J.A. 797(a)), confuses superior competitive performance with legally granted monopoly protection. The forwarders are entirely free to enter any market now served by Air Express. Whether they can satisfy the public needs with adquate service at reasonable rates will be determined by the forces of competition.

**/ Thus, in 1970, for example, Air Express carried approximately 25% of all air cargo shipments, while air freight forwarders and airline airfreight carried 40% and 35% respectively. (See J.A. 797(a); 600(a); 603(a)).

Through inter-service competition, each of the three modes has evolved a tariff structure which is geared to that segment of air cargo traffic which it can most economically handle (see REA Brief, pp. 8-14).

The CAB orders now under review will result in the elimination of all further Air Express competition. Thus, instead of having three options in meeting their air transportation requirements, shippers will have but two. Indeed, because almost 40% of U.S. airport cities receive no air freight forwarder service at all,*/ many shippers located outside the more populous metropolitan areas will soon have only the airlines' airfreight service available at substantially increased rates. Thus, while professing to "open the door to the forces of competition" (J.A. 696(a)), the CAB is actually eliminating one of three competing services in the major air cargo markets and delivering exclusive control over air cargo transportation to smaller cities into the hands of the airlines.**/

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*/ (J.A. 1200(a) - 1221(a); 1286(a) - 1294(a); 1690(a) - 1693(a); 625(a)).

**/ The CAB's failure to properly assess the competitive implications of its action terminating Air Express is a direct result of its total failure to undertake the statutorily required evaluation of comparative economic considerations (see pp. 4-9, supra). Had the CAB attempted to understand the economics of the situation, it would have appreciated that competitive realities require the continuation, not elimination, of the Air Express Service.

Furthermore, most recent developments in the inter-carrier discussions, authorized by the CAB in orders now under review, indicate an even greater potentiality for adverse competitive effects. As stated in the Airlines' Brief (pp. 30-31), "[s]everal of the airlines have also undertaken procedures to establish joint terminal facilities at approximately twenty-five major airports to be operated by a third party, as agent of each such airline, for accepting, delivering, and interchanging priority air cargo on behalf of each such airline." What the airlines neglect to state, however, is that the third party ground agent providing this service will be the airlines' wholly-owned company, Air Cargo, Inc. */

In effect, the airlines now intend to continue a form of air express service, simply replacing REA with their own wholly-owned company. If these plans materialize, there will still appear to be three services -- airline airfreight, air freight forwarding, and the new all-airline air express. However, since two of the services will be controlled exclusively by the airlines, they will not all be competitive.

Moreover, since air express is aimed at short-haul, small package shippers and airline airfreight at the carriage of large, long-haul shipments (with air freight forwarders

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*/ The selection of Air Cargo, Inc. as exclusive ground agent is reflected in the July 9, 1974 Report of Task Force on Common Priority Air Cargo Operational Terminal Facilities reproduced in Appendix A, infra. That the CAB is fully aware of this situation, is evidenced by the September 6, 1974 letter from the Director of its Bureau of Operating Rights to a shipper reproduced in Appendix B, infra.

carrying shipments falling in between), the services controlled by the airlines will effectively "wrap-around" the operations of the air freight forwarders. Thus, the airlines will directly control both ends of the air cargo industry and be in a position to confine the air freight forwarders to as narrow a segment of the market as they so choose. The forwarders, trapped in the middle, will have a strong incentive not to compete too vigorously so as to avoid retaliation by the carriers. This complete domination of the air cargo industry by the airlines would eliminate all semblance of competition to the disadvantage of the shipping public.

In the final analysis, the efforts of the CAB and the intervenors on its side to justify the elimination of Air Express on competitive grounds will simply not withstand close analysis. Indeed, the failure of the CAB to adequately consider the inevitable anticompetitive consequences of its action provides yet another example of a statutory public interest consideration disregarded by the Board.

II. The CAB Cannot Excuse Its Failure To Resolve The Ultimate Question Of The Public Interest In The Continuation Of Air Express By Focusing Solely On Selected Considerations Which Are Inadequate, Irrelevant, Or Inconsistent With The Evidence Of Record.

A. The CAB's arguments to this Court repeat and emphasize its departures from rational administrative decisionmaking

In our opening brief (REA Brief, pp. 47-48), we have

demonstrated the striking parallels between the CAB orders here under consideration and the Board's decision set aside by the First Circuit in Northeast Airlines, Inc. v. CAB, 331 F.2d 579 (1st Cir. 1964). In the Northeast case, as it has done here, the CAB confusingly intertwined the issue of the fitness of a particular carrier to perform an air transportation service with the initial and basic threshold question of whether there was a public need for that service. The Northeast court remanded the matter to the CAB for an explicit statement clarifying "the issue or issues actually decided and a statement of relevant bases for its decision supported by intelligible findings of fact." Id. at 588-89.

The CAB attempts to distinguish the clear holding of the Court of Appeals in Northeast by quoting language from its remand decision, New York-Florida Renewal Case, 41 C.A.B. 404, 407 (1964), where it again broadly asserted that there was nothing improper in its intermixing of considerations of public need and carrier fitness (CAB Brief, p. 36 n. 23). It fails to inform this Court, however, that the CAB itself, in the face of a second petition for review to the Court of Appeals, subsequently revoked and rescinded its 1964 decision. New York-Florida Renewal Case, 42 C.A.B. 885, 888 (1965).

The ultimate resolution of the administrative proceedings involved in the Northeast case, moreover, confirms the First Circuit's rationale. In New York-Florida Renewal Case, Reopened, 47 C.A.B. 112 (1967), the CAB adopted the

comprehensive initial decision of its hearing examiner. Id. at 114. The examiner's findings and conclusions in granting renewal on a permanent basis of Northeast's certificate for the East Coast-Florida route exemplify the proper administrative analysis required by the court in Northeast. Thus, the examiner undertook a three step approach to the problem: he found, first, that the public convenience and necessity required the proposed additional service; second, that Northeast was fit, willing and able to provide the service; and third, that there was no reasonable basis upon which a carrier other than Northeast should be selected. Id. at 160-62.

That the CAB has utterly failed to analyze the public interest in the continuation of Air Express service is manifest in the Board's "Counterstatement of the Issues" in its brief to this Court (CAB Brief, p. 2). The first issue presented there,*/ and the only one which ever mentions the "public interest", demonstrates that the CAB has not undertaken the statutorily mandated investigation of the public needs and convenience, but rather has limited its consideration to selected adversary contentions. The CAB has failed to comprehend that under the statutory scheme its first concern and primary focus must be the question of the public's need for air transportation service.

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*/ "Whether the Civil Aeronautics Board properly determined that the present air express system could not be continued and that the changes sought by REA were not in the public interest."

The Administrative Law Judge in the Service case fully understood the logical framework in which the question of the continuation of Air Express must be assessed. Thus, his ultimate findings were, first, that the Air Express Service is "responsive to a public need" and is "in the public interest and should be maintained," and second, that REA is the only qualified ground agent willing and able to provide Air Express (J.A. 635(a) - 636(a)). He then went on to determine whether REA's proposed changes in the express agreements were consistent with his earlier findings on the public needs and convenience (J.A. 736 (a)).*/

The CAB, however, has totally disregarded the basic question of the public interest in the continuation of Air Express. Instead, it has confusingly lumped together questions of REA's financial status with a distortion of REA's position on its proposed modifications of the Air Express agreements. It is clear, however, that only when the requirements of the shipping public have been properly assessed may the CAB appropriately turn to the question of how these requirements should best be satisfied. As in Northeast, the CAB's orders must be set aside and remanded for independent consideration of the "public interest" in continued Air Express service.

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*/ While REA disagrees with the Administrative Law Judge's specific findings with respect to its requests for modification, we are fully in accord with the logical structure of his analysis in resolving the issues.

B. The CAB's distortion of REA's position below does not excuse the CAB's failure to conform its deliberations to the statutory and case law requirements

As discussed above, the Federal Aviation Act prescribes those factors which the CAB must consider in evaluating the public interest in the continuation of Air Express, while the Northeast case establishes the logical framework in which the issues are to be analyzed. The CAB's brief to this Court attempts to avoid the question of its failure to undertake the analysis required by law by arguing that certain changes in the present air express system sought by REA -- independent rate setting authority and dual authority as a freight forwarder and carrier of air express -- were not feasible and were adverse to the public interest. Since REA supposedly identified these changes "as essential to the continuation of the present air express system,"*/ the CAB argues that once it determined that such modifications could not be granted, it had no alternative but to end Air Express entirely. The CAB's argument, however, wholly ignores the "public interest" standard and is based upon a gross misrepresentation of REA's position before the Board.

REA's original petition and complaint in 1970, which was the genesis of the CAB's Air Express investigations, was

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*/ CAB Brief, p. 53. In addition, the CAB variously characterizes REA's position as demanding the changes in order "to stay alive" and as "essential for survival" (CAB Brief, pp. 15, 19, 24).

filed as a response to the deadlocked negotiations between REA and the participating air carriers concerning renewal of the air express agreement. As stated therein, "[t]here is no disagreement among the parties that Air Express, a valuable public service for over forty years, should continue" (J.A. 37(a)). In order to break the deadlock and to strengthen the Air Express service, the petition and complaint sought the establishment of three major principles: first, that the airlines' share of air express revenues should be fairly related to what other airline customers pay for air transportation; second, that REA should have the independent right, subject to CAB approval, to develop and revise Air Express tariffs; and third, that the agreement should be permanent and provide for arbitration.

Nothing in the petition and complaint suggests that REA's proposed changes were to be considered on an all-or-nothing basis. In the circumstances of the deadlocked negotiations which then existed, it was REA's view that the proposed modifications were the optimal means of securing the long term viability of Air Express. Indeed, the request for independent rate setting authority was consistent with the CAB's own recommendation that the air express tariff rates be "determined and filed by REA" and its criticism of the "anomalous situation which permits the air carriers to set tariff rates for REA and at the same time compete with

REA for air cargo traffic." Air Freight Forwarder Case, supra, 9 C.A.B. at 486. See also Order E-5898 (1951).

Today, many of the major issues separating the parties to the air express agreement in 1970 have been and are being resolved through the negotiation process. While REA still believes that independent rate setting authority is desirable, the grant of such authority is not so essential to the continuation of service that the CAB's rejection of REA's proposal justifies extermination of the air express transportation concept. */

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*/ The CAB's reliance on a few excerpted comments by REA personnel and counsel, (CAB Brief, pp. 19, 34), attempting to show that without the modifications requested Air Express would have difficulty continuing, must be examined in the context of the surrounding administrative litigation. Clearly, REA could not expect the CAB to grant its requested changes unless it argued that these changes were needed to strengthen Air Express. Under the CAB's "you bet your life" approach, however, once REA argued that the changes were necessary and it was determined that the changes could not be granted, then the CAB was justified in junking the entire Air Express Service. Such an approach puts litigants in a wholly untenable position and totally disregards the statutory "public interest" inquiry required by law.

The most complete exposition of REA's position before the CAB is found in its July 17, 1972 "Brief to the Board." Nothing contained therein ever states that, absent the proposed modifications in the agreements, the Air Express Service should be terminated. Indeed, the brief argues at length that "the public interest requires preservation of the unique service provided only by REA Air Express" (Brief to the Board, pp. 3-8), and vigorously disputes the contentions of the freight forwarders and the CAB's Bureau of Operating Rights that Air Express should be abolished (id. at 43-48).

(footnote continued on next page)

With respect to dual air express and freight forwarding authority, REA's original petition and complaint contained no such request. It was only after the CAB indicated that existing freight forwarders would also be considered to carry air express traffic (J.A. 185(a)) that REA, in order to protect its competitive position, filed an application to conduct freight forwarding operations. Again, dual authority was never urged as an absolute prerequisite to continuation of the basic Air Express Service.

The only situation in which dual authority becomes absolutely necessary is a result of the CAB's requirement that REA shift immediately from Air Express to air freight forwarding, a result which REA never advocated. As we have explained in our opening brief (REA Brief, pp. 53-54), such a requirement, with no transition or start-up period, will

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(footnote continued from previous page)

The present circumstances are clearly distinguishable from those in Callanan Road Co. v. United States, 345 U.S. 507 (1953), cited by the CAB at p. 35 of its brief. There, the Court held that a party could not subsequently attack a decision of the ICC on the basis of arguments directly contrary to those which it had urged upon the agency and which the agency had accepted in reaching its earlier determination. Here, of course, despite the CAB's distorted characterization, REA has never taken the position that the CAB's only alternatives were either to grant REA's proposed changes or to destroy Air Express entirely. To the contrary, REA's consistent position has always been that the continuation of a sound and rationally based Air Express Service is essential and clearly in the public interest.

cause the inevitable collapse of REA as a business entity. */ The CAB does not dispute, or even address, this issue in its brief and piously washes its hands of the whole affair, stating that "[i]f REA cannot survive in its new role, the fault will not lie with the Board" (CAB Brief, p. 33).

The CAB's error in emphasizing and distorting limited adversary contentions is a direct result of its failure to undertake the logical analysis required by the Northeast case. The CAB must first fully and properly assess the needs of the shipping public in the continuation of Air Express service. Once this is accomplished, it must then determine how to structure the express service to best meet those needs. Thus, REA's proposals for modification should not be judged in a vacuum, but rather can only be properly evaluated in light of the public need for a sound and rationally based air cargo system.

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*/ When the CAB issued its original Service order, which required an instantaneous shift from air express to freight forwarding, REA immediately and repeatedly urged the Board that such a requirement was impossible to meet and would inevitably destroy REA. (J.A. 718(a) - 719(a); 724(a) - 725(a); 851(a) - 852(a)). REA's contentions are fully supported by testimony of record and uncontroverted factual affidavits. (See Service Tr. 856-57, 1316-17; Kania Affidavit dated June 10, 1974. See also REA Memorandum In Support of Motion to Stay, pp. 22-26, and supporting affidavits filed with this Court on July 5, 1974.)

C. The CAB's limited and flawed comparison of three isolated transportation characteristics of the air cargo services provides no ground for terminating air express

In its brief (CAB Brief, pp. 39-49), the CAB devotes considerable energy to examining three transportation characteristics of Air Express as compared to airline airfreight and air freight forwarding.*/ The CAB's analysis, however, is often inconsistent, inadequate and contrary to the evidence of record.

Thus, while its brief characterizes Air Express' priority treatment as "meaningless" (CAB Brief, p. 43), the CAB orders recognized that in the circumstances of the present fuel shortage and flight cutbacks "REA's exclusive claim to priority service could become a matter of real significance" (J.A. 797(a)n.16). Indeed, the CAB's finding that the airlines must provide highly expedited priority service is itself an admission that there is in fact a public need for an air cargo service with priority space aboard aircraft which Air Express now provides.**/ In considering the related

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*/ The AFFA brief, in an obvious effort to bolster the CAB's flawed analysis, discusses aspects of the emergency type high-expedite services currently available on the basis of evidence wholly de hors of the record (pp. 19-22) and undertakes a comparative examination of the "tracing capability" of Air Express and the air freight forwarders upon which the CAB never relied in its orders (pp. 28-30). Such blatant post hoc rationalizations should not be considered. SEC v. Chenery Corp., 332 U.S. 194 (1947).

**/ The CAB has admitted that this new high priority service to be established by the inter-carrier discussions is intended as "a replacement for air express." See infra pp. 28-32.

issue of speed of delivery, the CAB relies heavily on various survey evidence (CAB Brief, p. 41). These surveys merely show, however, that Air Express is either faster than or as fast as its air freight forwarder competition. What the CAB ignores is (1) that Air Express achieved this result at almost half the cost to shippers, (2) that air freight forwarder shipments created as many as 3 or more freight bills per shipment while Air Express involved only single documentation, and (3) that in several instances the air freight forwarders actually utilized the services of Air Express to complete the shipment (J.A. 1606(a) - 1609(a)).

The CAB's brief admits that the commodity coverage of Air Express is broader than the freight forwarder's present operations, but argues that the forwarders will soon expand their services (CAB Brief, p. 43). However, the briefs of Emery (p. 22) and AFFA (pp. 33-34) make clear that any increased service offerings for unusual commodities will be at rates significantly higher than those charged by Air Express. Again, the forwarders may be able to provide equal service, but only at a much greater cost to shippers.

The CAB's assertion that "the geographic coverage of air express service is today virtually duplicated by the air freight forwarders" (CAB Brief, p. 44) is factually incorrect. The record before the CAB is clear that over 200 of the nation's 524 airport cities (all of which were served by Air

Express) received no air freight forwarder service at all.*/ Indeed, the CAB itself has conceded Air Express' superior geographic coverage when it recognized that there will be "gaps in geographic coverage resulting from a termination of air express" (J.A. 681(a) and that "uncertainties are inevitable in the days ahead for air cargo service to small communities" (J.A. 793(a)).**/ The CAB's heavy reliance (CAB Brief, pp. 44-45) on the fact that certain carriers have declared their intention to withdraw from the air express agreement, thereby curtailing the geographic coverage of Air Express, is totally misplaced.***/ The carriers sought to withdraw only after the CAB issued its order in the Service case and as a direct result thereof. Clearly, the Board may not justify its order on the basis of circumstances which that order has itself created.

Even assuming, arguendo, that the CAB were correct in its assessment of each of the comparative factors it chose to investigate, its analysis would still not justify a conclusion that Air Express provides no unique service advantages. The Administrative Law Judge, in finding that "air

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*/ Service Exhibits (J.A. 1200(a) - 1221(a); 1286(a) - 1294(a); 1690(a) - 1693(a); 625(a)). While airline airfreight is availab at all such cities, this service charges high minimum rates on the small parcel traffic which Air Express primarily serves.

**/ See J.A. - 1686(a) - 1689(a).

***/ In fact, the CAB is factually incorrect in stating that North Central is no longer participating in Air Express. North Central's July 2 withdrawal has been nullified.

express is clearly distinguishable from the other services and has a special utility that the operations of the air freight forwarders and direct carriers presently do not supply" (I.D. 51), did not rely solely on the three factors of speed and priority treatment, geographic scope, and commodity coverage. In addition, he found that Air Express is also unique in its highly attractive small package rates (J.A. 622(a)), simplified rate structure (J.A. 601(a) - 602(a)), single documentation (J.A. 605(a) - 606(a)), single carrier responsibility (J.A. 599(a)), and dependable small shipment, short-haul service (J.A. 601(a)). */

The Administrative Law Judge's explicit finding as to the "special utility" of Air Express was thus based upon proper consideration of the totality of air express economic and service characteristics. The CAB's attempt to isolate but three of these attributes and ignore the rest is insufficient as a matter of law. In Re United Corp., supra, 249 F.2d at 181; Greater Boston Television Corp. v. FCC, supra, 444 F.2d at 853.

D. The CAB's arguments with respect to the new high-priority service are contradicted by its own orders and subsequent developments in the inter-carrier discussions

In its brief (CAB Brief, pp. 57-58), the CAB argues that the new high-priority service "envisioned" by the Board is not

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*/ The CAB expressly acknowledges that the "ALJ also identified single carrier responsibility and single carrier documentation as characteristic air express attributes" (CAB Brief, p. 17). Neither the CAB's orders nor its brief, however, discusses this factor or explains the Board's failure to do so.

intended as a mere replacement service for Air Express. Hence, in the CAB's view, it did not err in terminating Air Express prior to institution of the new service or refusing to afford REA with its basic right of due process in comparing Air Express to a non-existent and untested service conjured up by the Board. (See REA Brief, pp. 61-65).

The CAB's contentions, however, are belied by its own recent September 4, 1974 order concerning the proposed priority tariffs of Continental Air Lines and Western Air Lines (Appendix C, infra). There, the CAB interpreted its order in the Service case as placing the carriers "under an obligation to offer highly expedited inter-carrier priority service as a replacement for air express" (id. at 3, emphasis added). Further, it stated that the purpose of the pending inter-carrier discussions is "to decide on the procedures and details of how best to provide a coordinated inter-line priority service to replace air express" (id. at 3 n. 2, emphasis added).

Many of the carriers participating in the discussions are apparently of a similar view. Thus, as described above (supra, pp. 15-16), the proposal so far arising out of the discussions calls for the continuation of an air express service, simply substituting the airlines own Air Cargo, Inc. subsidiary for REA and increasing the rates for such service dramatically.*/ Indeed, the Director of the CAB's Bureau of

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*/ All the proposed new priority tariffs filed with the CAB to date contemplate a charge set at 130% of the existing airfreight tariffs which already are substantially higher than Air Express rates.

Operating Rights candidly admits that he expects the discussions to produce an agreement between various carriers and Air Cargo, Inc. whereby the latter will provide "necessary ground services for air express shipments of those participating carriers" (Appendix B, infra, emphasis added).

The principles of fairness and due process demand some sort of comparative hearing concerning the replacement of the present Air Express service with an all-airline substitute. Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945). The CAB's brief, quoting from one of its orders, states that, in its view, it "is not that the Board denied [REA] a comparative hearing on this matter, but that, after hearing, the Board rejected REA's proposal" (CAB brief, p. 58). Yet, the CAB concedes in its own counterstatement of the issues that it determined to replace Air Express without having established "the cost of the successor service and the exact form of the new High Priority Cargo Service" (id. at 2) and, as the brief subsequently admits, this hypothetical replacement service was only "envisioned by the Board" (id. at 57, emphasis added).

The CAB compounded its error by relegating the crucial issues with respect to the new priority service to a separate docket involving secret ex parte discussions among the airlines. See Moss v. CAB, supra, 430 F.2d at 899-900. While the CAB's brief (p. 29 n. 19) and the Airlines' brief (pp. 62-63) refer to the supposed procedural safeguards imposed

on these discussions by the Board, it is clear from the progress of the discussions that many of these restrictions have been totally ignored. Thus, the CAB's Order 74-4-1 required that participation in the discussions be limited only to "direct air carriers" and that interested party non-discussants would have access to agendas and minutes of the discussions and would be permitted to make oral and written presentations (id. at ¶¶ 1(a), (e) and (f)). However, at the Task Force meetings from which the proposals to replace REA with Air Cargo, Inc. have arisen, Air Cargo, Inc. -- which is not a direct air carrier -- has been permitted to participate.*/ Moreover, no agendas of these meetings were ever circulated, no outside interested parties were allowed to make presentations, and the reports of the Task Force have not been made available until almost a month after the meetings occurred.**/

It is clear that only when a concrete replacement proposal has been fairly and openly developed in on-the-record proceedings can the CAB conduct a rational economic and service inquiry to determine the precise advantages and disadvantages of the new service vis-a-vis Air Express. The CAB's

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*/ See supra, p. 15 and Appendix A, infra.

**/ For example, the report of the crucial July 9, 1974 meeting of the Task Force on Common Priority Air Cargo Operational Terminal Facilities (Appendix A, infra) reflects that no opinions by outside interested parties were presented at the meeting. Moreover, while the meeting took place on July 9, the report was not filed with the CAB until August 5.

procedural legerdemain terminating Air Express and consigning all consideration of a substitute service to a wholly separate and ex parte proceeding, is contrary to law and must be reversed.

* * *

In summary, the arguments presented in the CAB's brief, which simply parrot the orders now under review, not only fail to explain the CAB's disregard of the relevant "public interest" factors specified by statute, but also reemphasize the ad hoc adversary approach which it took with respect to these proceedings. The CAB never undertook the logical analysis of the public needs and convenience with respect to continuation of Air Express as required by the Northeast case. Instead, the CAB has based its arguments on a gross distortion of REA's position below, a flawed comparative examination of but three isolated transportation characteristics, and a total disregard of the detailed and explicit findings of its Administrative Law Judge. The multiplicity of dockets and orders cannot obscure what now emerges as the CAB's real purpose -- the elimination of REA and the transfer of entire control of Air Express to the airlines. The CAB's total failure to observe the fundamental precepts of due process and reasoned administrative decisionmaking requires that its orders be set aside.

III. This Court Should Set Aside The CAB Orders Here Under Review And Remand With Specific Directives That The CAB Conform Its Deliberations To The Requirements Of Law.

For all of the reasons stated in our opening brief and in this reply brief, the CAB's determination in its Express Service Investigation (Docket No. 22387) that the Air Express Service be abolished is erroneous and must be set aside. The CAB's Rates case orders (74-5-23 and 74-5-24), which are directly dependent upon the Service orders, must likewise be reversed.*/ Similarly, the three CAB orders arising in Docket 26238 Discussions Concerning Industry-Wide Priority Air Cargo Service (Orders 74-2-118, 74-4-1, and 74-5-74), which proceeding the CAB has described as looking towards the development of "the procedures and details of how best to provide a coordinated interline priority service to replace air express,"**/ also cannot stand.

On remand, the CAB should be instructed that, before reaching any conclusions with respect to the future of the

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*/ In Order 74-5-23, the CAB refused to pass upon the lawfulness of future air express rates and divisions on the ground that these issues have "been rendered moot" by the Service case decision. Similarly, the CAB based its Order 74-5-24 denial of consolidation of the Rates case and Freight Rate Investigation on the rationale that, under the circumstances of the mooting of the future rate issues in the Rates case, consolidation would be inappropriate. While the CAB argues that certain aspects of these orders are non-final (CAB Brief, p. 5 n. 2), at the same time it concedes that should the Service order be set aside "further action" with respect to the Rates case may be necessary.

**/ Order 74-9-4, Appendix C, infra, p. 3 n. 2 (emphasis added). See supra, pp. 29-30.

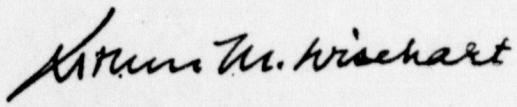
Air Express Service, it must first fully and adequately investigate the public interest, needs and convenience in the continuation of that service. This inquiry must include an examination of all of the transportation characteristics of Air Express identified by the Administrative Law Judge, most especially the economic considerations, as well as the other statutory "public interest" factors such as the effects on shippers, on competition, and on a balanced air transportation system.

After this basic inquiry has been completed, the CAB must determine, in light of its public interest findings, how best to satisfy the air transportation requirements of the shipping community. With respect to any priority service posed as a replacement for Air Express, a full and open on-the-record comparative hearing must be afforded, with reasonable and adequate recognition of the need for preserving REA's investment in a going business. Finally, an order, such as the ones now under review which effectively decreed by administrative fiat the collapse of REA, must be avoided.

CONCLUSION

For the foregoing reasons and for the reasons stated in our main brief, the orders involved in this appeal should be set aside and remanded with instructions.

Respectfully submitted,



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APPENDIX A

Report of Task Force on Common Priority
Air Cargo Operational Terminal Facilities
Dated: July 25, 1974

The Report was filed with the CAB and distributed to interested parties as Exhibit IV attached to the "Minutes -- Fourth Meeting -- Industry-Wide Priority Air Cargo Service -- Docket 26238" which were dated August 5, 1974.

Air Transport Association ata OF AMERICA

1709 New York Avenue, N.W.
Washington, D. C. 20006
Phone (202) 872-4000

July 25, 1974

MEMORANDUM NO. 6 DOCKET 26238

TO: Air Carriers Eligible to Participate in Discussions Concerning Industry-Wide Priority Air Cargo Service

SUBJECT: REPORT OF TASK FORCE ON COMMON PRIORITY AIR CARGO OPERATIONAL TERMINAL FACILITIES

The special task force met on July 9, 1974, at the Air Transport Association Headquarters, 1709 New York Avenue, N.W., Washington, D.C., Conference Room 441, beginning at 10:00 a.m.

Those present were as follows:

G. Shipman	- AA	Chairman
R. Corsiglia	- AC	
J. Mitchell	- EA	
W. Clarke	- TW	
J. Murphy	- TW	
G. Malloy	- WA	
F. Black	- ATA	
F. Couture	- ACI	
T. Gagnon	- ACI	
P. Bessel	- CAB	
T. Moore	- CAB	

The report in connection with this meeting is attached.

Frank J. Black
Secretary

FJB:jdw

Attachment

REPORT ON TASK FORCE

ON COMMON PRIORITY AIR CARGO

OPERATIONAL TERMINAL FACILITIES

JULY 9, 1974

The Chairman of the task force meeting was Mr. George Shipman, American Airlines.

It was noted that only one response to the group's request for a bid was received. This response was made by Air Express Terminal Services, 5425 Dixie Road, Mississauga, Ontario, Canada L4W 1E6.

The group then undertook a complete review of Air Express Terminal Services bid response.

However, at 1:30 p.m., a telephone message was received from Mr. B. R. Dravis, President, Air Express Terminal Services stating the following:

> "The offer that has been submitted to you this morning must be withdrawn due to facility complications that have just arisen, making consideration at this time not appropriate.
>
> B. Dravis"

This verbal communication was verified in writing later in the afternoon of July 9, 1974.

The group concluded that as a result of the withdrawal of the Air Express Terminal Service bid, it appeared that the continued pursuit of the operation of common priority air cargo terminal facilities could now only be made through an airline industry organization.

The group concluded that it appeared that it was now the appropriate time for those carriers interested in common operational terminal facilities to seek the advice of outside legal counsel.

The group reviewed the existing facilities agreement between certain airlines and Air Cargo, Inc., as it pertains to certain airports which have common air cargo facilities in behalf of these certain airlines.

The group felt that with the requirements in the start up of any common terminal facility such as, leasing of space, equipment, personnel hiring and training that the preparation of a request for an extension of the present air express agreements until 12-1-74 would be very necessary.

The group recommended the following steps be taken in the advancement of this project:

- retain counsel for interested air carriers,
- request extension in present air express agreements until December 1, 1974, to provide necessary time for proper set up of common priority air cargo operational terminal facilities, unless action by the U.S. Court of Appeals in New York provides the additional time necessary,
- counsel review Air Cargo, Inc. Agreements,
- counsel to research question whether airline group would need to seek permission from the C.A.B. to have joint talks with Air Cargo, Inc., and,
- recommend that Air Cargo, Inc., design a cost allocation formula for such common terminal facilities as would be required for a Priority Air Cargo Service Operation.

In connection with the payment of any legal fees incurred by interested air carriers as might occur from the above recommendations, the following formula was agreed to:

- 50% of counsel fees would be divided equally among interested carriers; and,
- 50% would be divided on a prorata basis on individual air carrier's air freight ton miles, 1st quarter 1974.

APPENDIX B

Letter from William B. Caldwell, Jr., Director of the Bureau of Operating Rights of the Civil Aeronautics Board, to John Bergman, Traffic Manager of the Loma Corporation, dated September 6, 1974.

A-6

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C. 20428

IN REPLY REFER TO: B-70-75

SEP 6 - 1974

AIR MAIL

Mr. John Bergman
Traffic Manager
Loma Corporation
P.O. Box 40350
9651 U.S. Highway 81 South
Fort Worth, Texas 76140

Dear Mr. Bergman:

This is in reply to your recent communication concerning the termination of the Board's approval of the present system of Air Express service, as performed exclusively by REA Express, Inc.

After a thorough four-year investigation (Express Service Investigation, Docket 22385) into the legal and practical issues associated with the present manner in which air express service is performed, and the need for a priority air cargo service, the Board has decided that the present system cannot and should not be maintained. Accordingly, the Board directed that the air express exemption authority of REA and the approvals of the agreements under which air express service is now offered should terminate on the date that REA commences air freight forwarder operations or on August 1, 1974, whichever date occurs first (Orders 73-12-36, 74-5-25, and 74-6-118). REA has petitioned for review of this decision of the Board by the United States Court of Appeals for the Second Circuit, in New York. That court has granted a motion for a stay of the effectiveness of the Board's orders until a court decision on REA's appeal becomes effective.

The Board has also decided that there is a public need for priority air cargo service, and it directed the scheduled air carriers to establish such a service. The airlines are now conducting discussions to decide on the details of how they should provide this new service (Docket 26238, Orders 74-2-118, 74-4-1, and 74-5-74). It is expected that two agreements resulting from these discussions will be filed with the Board, in accordance with section 412 of the Federal Aviation Act of 1958 (49 U.S.C. 1382). One will deal with interline forms and procedures for handling air express, and the other will be an agreement among approximately seven airlines to contract with a third party (Air Cargo, Inc.) to administer joint air express terminals at twenty-one major airports and to provide other necessary ground services for air express shipments of those participating carriers. If you desire to

receive agenda or minutes of these airline discussions, or to communicate views on what types of services the airlines should provide as part of this new priority air cargo service, you can write to or call Mr. G. J. Godbout, Director of Cargo Services, Air Transport Association of America, 1709 New York Avenue, N.W., Washington, D. C. 20006, telephone number, 202 872-4129.

Also, several airlines have exercised their right to withdraw, or have given notice of their intention to take such action, from their agreement with REA concerning Air Express, including Southern, Delta, North Central, Northwest, United, Piedmont, Ozark, and Continental. REA has filed a complaint with the Board against some of these air carriers for withdrawing from the present Air Express Tariff (Docket 26865).

Some air carriers have also filed their own tariffs for individual air express service. The Board has suspended those of Delta and Southern (Docket 26837, Order 74-6-135) and also decided to investigate those, as well as a priority freight tariff filed by Western (Docket 26838, Order 74-6-136). Delta and Southern have filed petitions for reconsideration of the Board action taken on their tariff filings. American and United have also filed individual air express tariffs, and REA has filed a complaint against that of United (Docket 26866).

If the Board or its staff can be of further assistance, please let us know.

Sincerely yours,

William B. Caldwell, Jr.
Director, Bureau of
Operating Rights

APPENDIX C

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 4th day of September, 1974

"Proud Bird Express" air freight rates proposed by CONTINENTAL AIR LINES, INC.	Docket 27003
Priority reserved air freight rates proposed by WESTERN AIR LINES, INC.	Docket 26838

ORDER OF INVESTIGATION AND CONSOLIDATION

By tariff revisions bearing the issue date of August 7, and marked to become effective September 6, 1974, Continental Air Lines, Inc. (Continental) proposes to establish premium general commodity rates for a new "Proud Bird Express" reserved freight service. The proposed rates amount to 130 percent of the applicable general commodity rates, with minimum charges per shipment equal to the charges per 100 pounds. The shipper is provided a reservation, which is defined as a commitment by the carrier to transport a predetermined volume of freight on a specific flight. Advance reservation must be made with the carrier at least 3 hours prior to the flight requested, and the shipment must be tendered to the carrier at least 45 minutes prior to the scheduled flight departure.

The shipper will be charged for the total volume reserved, whether or not actually tendered, on the basis of actual weight of the shipment or its cubic density at 10 pounds per cubic foot, whichever is greater. However, if the unutilized space does not exceed 10 percent of that reserved, the charge will be only for the actual or cubic weight shipped.

In the event the shipment is not carried on the agreed-upon flight, the shipper will be refunded the surcharge applicable for this service, and will be charged the applicable rates for standard service. The proposal bears an expiry date of December 31, 1974.

In support of its proposal, Continental contends essentially that (1) the proposed service is basically an extension of its existing small package tariff, a replacement for air express, and a new service for all types of shipments that require expedited service; (2) shippers of any size of shipment--not just small shipments--will have the ability to reserve space on a particular flight; (3) the reservation system will enable the carrier to preplan the flight and ensure that the higher priority shipment will be accommodated on the exact flight agreed upon; (4) the proposed service will attract traffic outside the present realm of air express--the documented growth of small package traffic testifies to the fact that confirmed traffic on an agreed flight is a service acceptable to shippers; and (5) in regard to capacity costs, the 30 percent markup is in line with the weighting applied to priority air freight in Docket 18381.

Complaints requesting rejection, or suspension and investigation of the proposed rates, were filed by The National Small Shipments Traffic Conference, Inc. (National) and REA Express, Inc. (REA).[1/] National contends, inter alia, that (1) as a replacement service for air express, the proposed service is not comparable to the present service offered and it is unnecessary and unacceptable in its present form; (2) a service so limited in scope as a single-line service has minimal value for the shipping public; (3) the basis for the 30 percent rate increase is not appropriate and is strictly an inflationary rate which has not been cost justified; (4) the three-hour reservation restriction is an inconvenience that the increased rates certainly do not justify; and (5) the proposed service is inappropriate at this time because (a) REA has been granted an extension of the expiration date for air express; and (b) the airlines are still in the process of discussions concerning an industry-wide priority air freight service.

REA contends, inter alia, that (1) Continental's proposal fails to provide shippers who have used air express with the adequate replacement service they need; (2) the proposed tariff fails to provide armed-guard service, pick-up and delivery service, and will not guarantee same-day service; (3) the three-hour advance-reservation requirement does not permit shippers to get priority service upon tender less than an hour before flight time, as they can with air express; (4) Continental's tariff violates Section 404(a) of the Act if it intends to replace air express; (5) the proposal will deny shippers the right they presently have to get their traffic on the first available flight, no matter which carrier is operating, at a uniform rate level; and (6) Board Order 73-12-36 states

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1/ REA requested rejection or suspension and investigation, while National requested suspension pending investigation.

that all airlines have an obligation to provide priority service, with inter-airline coordination as part of their obligation to provide adequate service under Section 404(a), and the Board has no jurisdiction to modify this order since it is being reviewed by the Court.

In answer to the complaints, Continental asserts, inter alia, that its proposal is not comparable to current air express (and on this point it agrees with complainants), because it would apply also to larger shipments than those carried by air express; that its 30 percent premium is appropriate; and that the airport-to-airport service proposed would satisfy most shippers requiring expedited service, in which shippers would provide their own pick-up and delivery service.

By Order 74-6-136, dated June 28, 1974, the Board instituted an investigation of the "Priority Reserved" air freight rates proposed by Western Air Lines, Inc. (Western), but permitted them to become effective. Continental's instant proposal is almost identical to Western's, and the reasons for our actions on the latter proposal are equally applicable to the instant filing. Consistent with the Board's finding regarding Western's filing and upon consideration of all relevant factors, the Board finds that Continental's tariff proposal may be unjust, unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and should be investigated.

There is a significant question as to whether the proposed service is subject to unreasonable and discriminatory limitations and provisions, and whether it is consistent with the Board's finding that the carrier is under an obligation to offer highly expedited inter-carrier priority service as a replacement for air express (Order 73-12-36).2/ Among other things, the Board is concerned about (1) the percentage of premiums for specific commodities, which will be greater than for general commodities because the rates for all traffic will be 30 percent above the GCR's; (2) the use of 10 pounds per cubic foot as the dimensional weight, which has not been fully substantiated; and (3) the adequacy of the cost justification in support of the premium service charge.

2/ It should be noted that, while Continental states that this new priority service is intended as a replacement for air express, Continental still transports air express traffic. However, Continental has announced its intention to withdraw from the air express agreement effective December 28, 1974. In addition, the carrier is also a participant in the current inter-carrier discussions to decide on the procedures and details of how best to provide a coordinated interline priority service to replace air express.

The Board has considered the request for rejection and finds no basis for such action.

Accordingly, pursuant to the Federal Aviation Act of 1958, and particularly Sections 204(a), 403, 404, and 1002 thereof,

IT IS ORDERED THAT:

1. An investigation is instituted to determine whether the charges and provisions in Rule No. 71 on the Original Page 38-E and Original Page 38-F and reissues thereof of Tariff C.A.B. No. 169 issued by Airline Tariff Publishers, Inc., Agent, and rules, regulations, or practices affecting such charges and provisions are or will be unjust, unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and if found to be unlawful, to determine and prescribe the lawful charges and provisions and rules, regulations, and practices affecting such provisions;

2. The investigation initiated herein, designated Docket 27003, is hereby consolidated into the Priority Reserved Air Freight Rates Investigation, Docket 26838;

3. Except to the extent granted herein, the complaints of The National Small Shipments Traffic Conference, Inc., in Docket 26967, and REA Express, Inc., in Docket 26955 are dismissed; and

4. Copies of this order shall be served upon Continental Air Lines, Inc., and REA Express, Inc., which are hereby made parties to Docket 26838.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of October, 1974 caused to be served, by first-class mail, postage prepaid, copies of the foregoing Reply Brief for Petitioner REA Express, Inc. upon the following:

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October 8, 1974